

1 Margo Piscevich, NV Bar No. 0917
2 Mark J. Lenz, Esq., NV Bar No. 4672
Piscevich & Fenner
3 499 West Plumb Lane, Suite 201
Reno, Nevada 89509
4 Tel: (775) 329-0958
Fax: (775) 329-2666
Attorneys for DEFENDANTS

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6 **U.S. DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8

9 KEVIN J. MIRCH, ESQ.,

Case No. 3:05-cv-00641-RLH-RAM

10 Plaintiff,

11 v.

12 BRUCE BEESLEY, ROB BARE, BRIDGET ROBB
13 PECK, DONALD CHRISTENSEN, STATE BAR OF
NEVADA, DOES I-X, A-Z CORPORATIONS,

14

15 Defendants

16 **Motion to Dismiss (Fed.R.Civ.P. 12(b)(1))**

17 Defendant State Bar of Nevada (“State Bar”), for itself alone, moves the Court pursuant
18 to Fed. R. Civ. P. 12(b)(1) for an Order dismissing Plaintiff’s Complaint on the grounds that this
19 Court lacks subject matter jurisdiction over the State Bar. The Eleventh Amendment of the
20 United States Constitution prevents this Court from exercising subject matter jurisdiction over
21 the State Bar, which, as an arm of the state, is immune from this and similar lawsuits.
22 Furthermore, as Plaintiff concedes in his First Amended Complaint, pre-existing ongoing
23 disciplinary proceedings before the State Bar against Plaintiff require this Court to abstain in
24 favor of the state judicial proceedings, pursuant to the *Younger* abstention doctrine.
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Piscevich & Fenner
499 West Plumb Lane, Suite 201
Reno, NV 89509 775.329.0958

This motion is based on the pleadings and papers filed herein, the Memorandum of Points and Authorities which follow, and upon such further evidence and argument of counsel as the Court may require or allow.

Memorandum Of Points And Authorities

I. Nature of the Case.

On November 23, 2005, Plaintiff Kevin Mirch (“Mirch”) filed a complaint in this court for the sole purpose of obfuscating a disciplinary proceeding pending against him before the State Bar. He did not serve this complaint on any Defendant. On March 23, 2006, 120 days later, Mirch filed a First Amended Complaint and served it on Defendants.¹ Mirch’s First Amended Complaint is indisputably a prime example of vexatious and inappropriate litigation, comprising sixty (60) pages and four hundred (400) paragraphs of repetitive, accusatory, defamatory, largely unintelligible allegations against a panoply of judges, mediators, attorneys and State Bar officials, all of whom are accused of conspiring against Mirch to destroy his law practice and reputation. His allegations span a period of twenty (20) years or more, and range from nefarious political skullduggery, to terrorism (bombing of his office), to theft and fraud, to intent to cause Mirch mental harm. However, Mirch’s allegations, even if they were all, in some imaginable universe, to be accepted as true, must fail to overcome the obvious and fatal jurisdictional deficiencies in his First Amended Complaint.

Although Mirch is an attorney licensed to practice law in the State of Nevada since December 31, 1983, (Nevada State Bar Number 923), and has had some apparent successes in his practice, he has also been accused on numerous occasions of stepping beyond the bounds of

¹ Plaintiff also employed this delayed-service tactic in the underlying state action before Judge Hardesty, who determined the conduct to be additional evidence of bad-faith on Plaintiff's part.

1 legal propriety, one of which purportedly forms the basis for this present action. On September
 2 26, 2002, he filed a First Amended Complaint in the Second Judicial District Court, Washoe
 3 County, Nevada, styled *Kevin J. Mirch, Doe Plaintiffs A-Z v. McDonald, Carano & Wilson, LLP,*
 4 *Leigh Goddard, Esq., and Doe Attorneys 1-10.*, case no. CV02-05644. On October 9, 2003,
 5 District Judge James Hardesty entered an Order Dismissing Plaintiff's lawsuit, imposing
 6 sanctions pursuant to NRCP 11, and referring the matter to the State Bar for disciplinary
 7 investigation. Following additional correspondence and investigation, the State Bar filed a
 8 Formal Complaint against Mirch on June 14, 2004. After extensive motion practice and
 9 continuances, most of which were requested by Mirch, the matter is scheduled for hearing
 10 beginning July 13, 2006. It is this hearing which Mirch now seeks to enjoin.

12 II. Statement Of Facts. 13

14 The nature and organization of the State Bar is established by statute and rules
 15 promulgated by the Nevada Supreme Court. The State Bar of Nevada is a public corporation
 16 created by statute. NRS 7.275 (2001) provides,
 17

- 18 1. The State Bar of Nevada, a public corporation heretofore created by statute, is hereby
 continued ***under the exclusive jurisdiction and control of the supreme court.***
- 19 2. The State Bar of Nevada has perpetual succession and a seal and it may sue and be
 sued. It may, for the purpose of carrying into effect and promoting its objectives:
 (a) Make contracts.
 (b) Own, hold, use, manage and deal in and with real and personal property.
 (c) Do all other acts incidental to the foregoing or necessary or expedient for the
 administration of its affairs and the attainment of its purposes.
- 20 3. Rules for the government of the State Bar of Nevada shall be made by the supreme
 court pursuant to NRS 2.120

24 (Emphasis added).

25 Nevada Supreme Court Rule (SCR) 76 expands upon this language, and provides,

- 26 1. The State Bar of Nevada, a public corporation heretofore created by statute, shall
 govern the legal profession in this state, subject to the approval of the supreme court.
 The state bar is under the exclusive jurisdiction and control of the supreme court and

1 is an association of persons now or hereafter regularly licensed to practice law in the
 2 State of Nevada.

3 2. The state bar has perpetual succession and a seal and it may sue and be sued. It may,
 4 for the purpose of carrying into effect and promoting its objectives, make contracts,
 5 own, hold, use, manage and deal in and with real and personal property, subpoena
 6 witnesses for the purpose of aiding in cases of discipline, suspension or disbarment, or
 7 application for admission, and do all other acts incidental to the foregoing or necessary
 8 or expedient for the administration of its affairs and the attainment of its purposes

9 (Emphasis added).

10 Finally, with respect to discipline of Nevada-licensed attorneys, SCR 99 provides,

11 1. Every attorney admitted to practice law in Nevada or specially admitted by a court of
 12 this state for a particular proceeding, or practicing law here, whether specially admitted
 13 or not, ***is subject to the exclusive disciplinary jurisdiction of the supreme court and
 14 the disciplinary boards and hearing panels created by these rules.***

15 2. Nothing contained in these rules denies any court the power to maintain control over
 16 proceedings conducted before it, such as the power of contempt, nor do these rules
 17 prohibit any association from censuring, suspending, or expelling its members.

18 (Emphasis added).

19 As noted, Mirch is a Nevada-licensed attorney. [First Amended Complaint, ¶ 16].

20 Mirch's Fifth Cause of Action, among others, alleges that there are already ongoing disciplinary
 21 proceedings in this matter arising from Judge Hardesty's Order which pre-date this present
 22 action. Because of the near-impossible difficulty in citing to any specific facts in Mirch's First
 23 Amended Complaint, the State Bar attaches hereto as **Exhibit "A"** a copy of the discipline
 24 Complaint currently pending before the State Bar.

25 III. Argument

26 A. This Court Lacks Subject Matter Jurisdiction Over
 27 The State Bar Of Nevada Based Upon Sovereign
 28 Immunity, As Provided For In The Eleventh Amendment
 29 To The United States Constitution.

1 This Court lacks subject matter jurisdiction to adjudicate Mirch's action for injunctive
 2 and declaratory relief against the State Bar because the State Bar enjoys immunity from suit
 3 pursuant to the Eleventh Amendment of the United States Constitution. The Eleventh
 4 Amendment of the United State Constitution provides: "The Judicial power of the United States
 5 shall not be construed to extend to any suit in law or equity, commenced or prosecuted against
 6 one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign
 7 State."

9 It is well established that the Eleventh Amendment stands as jurisdictional bar to suits
 10 brought in federal court against state agencies and departments. *Charley's Taxi and Radio*
 11 *Dispatch v. Sida of Hawaii*, 810 F.2d 869, 873 (9th Cir. 1987) citing *Almond Hill School v.*
 12 *United States Department of Agriculture*, 768 F.2d 1030, 1034 (9th Cir. 1985). See, also,
 13 *Alabama v. Pugh*, 438 U.S. 781, 781-82 (1977), *Elderman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct.
 14 1347, 1363 (1974)(“the Eleventh Amendment immunity defense sufficiently partakes of the
 15 nature of a jurisdictional bar . . .”); *Draper v. Coombs*, 792 F.2d 915, 918 (9th Cir. 1986); *Wu v.*
 16 *State Bar of California*, 953 F. Supp. 315; 318-19 (C.D. Cal. 1997)(asserting that “[t]he Eleventh
 17 Amendment provides the State Bar of California with immunity from suits in federal court for
 18 monetary relief.”).

20 This immunity exists whether the relief sought is legal or equitable. *Papasan v. Allain*,
 21 478 U.S. 277, 106 S.Ct. 2932 (1986), citing *Pennhurst State School and Hospital v. Halderman*,
 22 465 U.S. 89, 10, 14 S.Ct. 900, 908 (1984). It is also well established that the only exception to
 23 this immunity, absent an “unequivocal indication” of a waiver of that immunity,² is a suit
 24 seeking to prospectively enjoin a “state official” from engaging in an alleged unconstitutional

27 ² See *Charley's Taxi*, *supra*, at 873, citing *Atascadero State Hospital v. Scanlon*, 473 U.S.
 28 234, 105 S.Ct. 3142, 3145 n. 1, 87 LEd.2d 171 (1985).

1 act. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 10, 14 S.Ct. 900, 908
 2 (1984). *Papasan v. Allain*, 478 U.S. 265, 277, 16 S.Ct. 2932, 2939 (1986), citing *Ex parte Young*,
 3 29 U.S. 123, 28 S.Ct. 441 (1908). See, also, *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d
 4 624, 626 (9th Cir. 1989)(emphasis added).

5 The Nevada Supreme Court is immune from suit in federal court. *Louis v. Supreme*
 6 *Court of Nevada*, 490 F.Supp. 1174, 1180 (D. Nev. 1980) ("The Supreme Court of Nevada is an
 7 agency of the State of Nevada and immune from suit under the Eleventh Amendment to the U. S.
 8 Constitution." citing, *Brown v. Supreme Court of Nevada*, 476 F.Supp. 86 (D.Nev.1979)).
 9 Indeed, the Supreme Court is the State of Nevada. *Goldberg v. Eighth Judicial Dist. Court*, 572
 10 P.2d 521, 522, 93 Nev. 614, 615 (1977) ("[I]t is clear that the judiciary, as a coequal branch of
 11 government, has inherent powers to administer its affairs.")³

12
 13 "[T]he State Bar of Nevada is the investigative arm of the Nevada Supreme Court
 14 charged with investigating and disciplining the legal profession in Nevada." *O'Connor v. State of*
 15 *Nevada*, 57 F.Supp. 546, 550 (D. Nev. 1981), *aff'd*, 686 F.2d 749 (9th Cir. 1982), *cert. den.*, 459
 16 U.S. 1071, 103 S.Ct. 491 (1982). See, also, *Ginter v. State Bar of Nevada*, 625 F.2d 829, 830
 17 (9th Cir. 1980)(affirming the dismissal of a plaintiff's suit because "the Nevada State Bar
 18 Association, as an arm of the state, is not subject to suit under the Eleventh Amendment"). As
 19 "arms of the state itself," the State Bar of Nevada and the Supreme Court of Nevada do *not* act in
 20 the capacity of "state official[s]" as contemplated by the only exception to Eleventh Amendment
 21 immunity set forth in *Ex parte Young*, *supra*, and its progeny. *Id.*
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26 ³ Article 3, section 1, of the Nevada Constitution provides, "The Powers of the Government of the
 27 State of Nevada shall be divided into three separate departments, the Legislative, the Executive
 28 and the Judicial;..." Article 6, section 1, provides, "The Judicial power of this State shall be
 vested in a court system, comprising a Supreme Court, District Courts, and Justices of the Peace."

In short, a state itself or an "arm" thereof is *not* subject to a suit for any form of injunctive or declaratory relief in light of the Eleventh Amendment's express jurisdictional bar, absent an unequivocal waiver. Suffice it to say, Nevada has expressly *refused* to waive its Eleventh Amendment immunity. NRS 41.031(4). In light of the foregoing, the State Bar of Nevada respectfully hereby invokes its Eleventh Amendment immunity as an express jurisdictional bar to Mirch's suit. Therefore, Mirch's claims against the State Bar of Nevada must be dismissed because this Court lacks subject matter jurisdiction.

B. The Abstention Doctrine Set Forth In *Younger v. Harris* Mandates That This Court Refrain From Intervening In Ongoing Disciplinary Proceedings.

In *Younger v. Harris*, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the United States Supreme Court reversed the decision of the Central District of California enjoining prosecution and enforcement of California's Criminal Syndicalism Act on the grounds it was unconstitutionally vague and overbroad. The Supreme Court found that the injunction was, "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.*, at 749 (*citing* 28 U.S.C. 2283, "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."). The Supreme Court also reversed the declaratory judgment entered by the lower court, noting that, "declaratory relief is also improper when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated." *Id.*, at n.2.

In *Rosenthal v. Carr*, 614 F.2d 1219, (9th Cir. 1980), the Ninth Circuit Court of Appeals extended the abstention doctrine to disciplinary hearings. In *Rosenthal*, Plaintiff was a California licensed attorney against whom disciplinary proceedings were pending. He filed suit

1 in federal court, seeking injunction and declaratory relief against the State Bar. In affirming the
 2 dismissal, the Appeals Court stated,

3 The abstention doctrine, as announced in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746,
 4 27 L.Ed.2d 669 (1971) and extended in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct.
 5 1200, 43 L.Ed.2d 482 (1975), and *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911,
 6 52 L.Ed.2d 486 (1977), bars a federal court from enjoining pending state court criminal
 7 or civil enforcement proceedings absent exceptional circumstances. **We agree with**
decisions of the Second, Third and Fourth Circuits that the abstention doctrine
generally precludes federal court interference with pending state attorney disciplinary
proceedings. *Anonymous v. Association of the Bar of City of New York*, 515 F.2d 427
 8 (2d Cir.), cert. denied, 423 U.S. 863, 96 S.Ct. 122, 46 L.Ed.2d 92 (1975); *Erdmann v.*
 9 *Stevens*, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d
 10 147 (1972); *Gipson v. New Jersey Supreme Court*, 558 F.2d 701 (3d Cir. 1977);
 11 *American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir.), cert. denied, 429
 12 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976). See also *Mildner v. Gulotta*, 405
 13 F.Supp. 182 (E.D.N.Y.1975), aff'd sub. nom. *Levin v. Gulotta*, 425 U.S. 901, 96 S.Ct.
 14 1489, 47 L.Ed.2d 751 (1976).

15 *Id.* (emphasis added).

16 A year later, the Ninth Circuit revisited the abstention doctrine in disciplinary matters in
 17 *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981). Four of the five sitting Justices of
 18 the Nevada Supreme Court appealed an order of the District Court enjoining disciplinary
 19 proceedings based upon the District Court's finding of "bias-in-fact" by the Nevada Supreme
 20 Court against Flangas. "The district judge concluded that the bias-in-fact on the Nevada
 21 Supreme Court constituted an "exceptional circumstance" that is an exception to the general rule
 22 against enjoining ongoing state proceedings." *Id.*, at 948.⁴

23 The Court of Appeals reversed. "[T]he abstention doctrine would normally bar the
 24 district court from enjoining the pending attorney disciplinary proceeding absent a showing by
 25 Flangas of "exceptional circumstances." *Id.*, at 949. However, the Court found that since
 26 Flangas had failed to utilize statutory and constitutional measures available under Nevada law to

27 ⁴ It should be noted that the District Court dismissed the State Bar of Nevada as a defendant,
 28 which dismissal Flangas did not appeal.

cure the alleged bias of Nevada Supreme Court, it could not be determined whether there were "exceptional circumstances" as would allow district court to enjoin disciplinary proceeding before Nevada Supreme Court.

IV. Conclusion.

Mirch's lawsuit concerns a disciplinary proceeding before the State Bar of Nevada against a Nevada-licensed attorney. The State Bar enjoys constitutional immunity in this matter and, accordingly, this Court lacks subject matter jurisdiction.

Even if suit were later brought against an individual official of the State Bar instead of the Bar itself, this Court would be required to abstain in favor of the already ongoing state judicial proceedings. Accordingly, this Court should grant The State Bar's Motion to Dismiss with Prejudice for Lack of Subject Matter Jurisdiction and consistent with the *Younger* abstention doctrine.

Dated this 19th day of April, 2006.

PISCEVICH & FENNER

By: /s/ _____
Mark J. Lenz, Esq.
499 West Plumb Lane, Suite 201
Reno, NV 89509
Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of PISCEVICH & FENNER and that on this date I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

Document Served: MOTION TO DISMISS

Person(s) Served:

Kevin J. Mirch
329 Flint Street
Reno, NV 89501

XX Hand Deliver
U.S. Mail
Overnight Mail
Facsimile
[number]

DATED this 19th day of April, 2006.

/s/ _____
TERESA BORJON